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In The

Supreme Court of the United States

TEXTRON INC., *et al.*,

Petitioners,

v.

COMMISSIONER OF REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of The Commonwealth Of Massachusetts

BRIEF OF GENERAL MOTORS CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of the Supreme Court, General Motors Corporation, a Delaware corporation, respectfully submits this brief as *amicus curiae* in support of Petitioner.[1] General Motors is a multi-state and multi-national corporation headquartered in Detroit, Michigan. General Motors, by itself and through a variety of subsidiaries, does business in all 50 states and employs over 212,000 people in North America. General Motors is engaged in the production and sale of motor vehicles and locomotives and in satellite broadcasting activities. In addition, General Motors, through its General Motors Acceptance Corporation subsidiary and its subsidiaries, engages in the financing of motor vehicles and residential and commercial properties.

General Motors, as a corporation incorporated and domiciled outside the state of Massachusetts, has a vital interest in the resolution of this case which concerns the constitutionality of certain aspects of the Massachusetts corporate excise tax. In the opinion below, *Textron Inc., et al. v. Commissioner of Revenue*, 435 Mass. 297, 756 N.E.2d 1142 (2001), the Massachusetts Supreme Judicial Court, inter alia, endorsed Directive 99-1 which was issued by the Massachusetts Department of Revenue in an attempt

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[1] Pursuant to Rule 37.6, amicus General Motors Corporation states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. General Motors Corporation has received the written consents of Petitioners and Respondent to the filing of this brief; those consents have been filed with the Clerk of the Court.

to correct certain constitutional defects in the Massachusetts corporate excise tax as identified by the Massachusetts Supreme Judicial Court in *Perini Corp., et al. v. Commissioner of Revenue*, 419 Mass. 763, 647 N.E.2d 52, *cert. denied*, 516 U.S. 822 (1995). General Motors asserts that the Massachusetts Supreme Judicial Court's endorsement of Directive 99-1 in the opinion below was erroneous in that the Directive fails to correct all constitutional defects in the corporate excise tax. General Motors submits that Massachusetts' attempt to correct the corporate excise tax's infirmities through the adoption of Directive 99-1 will have a significant, adverse effect on interstate commerce which will only be exacerbated if other states follow Massachusetts' lead and adopt similar taxing provisions. General Motors believes that all taxpayers and all states will be best served by tax rules that do not treat domestic corporations more favorably than their foreign counterparts. Because of its years of practical experience, General Motors believes that it is uniquely suited to assist this Court in resolving the questions presented in the Petitioners' petition for a writ of certiorari.

INTRODUCTORY STATEMENT

This brief is submitted by General Motors Corporation as *amicus curiae* in support of the petitioner in the above-captioned matter. Written consents of the petitioner and respondent have been obtained and filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Prior to the Massachusetts Supreme Judicial Court's decision in *Perini*, domestic intangible property corporations, in determining their net worth for purposes of the Massachusetts corporate excise tax, were entitled to deduct: 1) investments in Massachusetts subsidiaries in which they owned 80% or more of the stock; and 2) tangible property located in Massachusetts subject to local taxation. As a result of the *Perini* decision, both foreign and domestic intangible property corporations are permitted to deduct their investments in 80% owned subsidiaries regardless of state of incorporation or domicile of the subsidiary. The Massachusetts Department of Revenue stated this rule in Directive 99-1 (issued January 4, 1999). However, neither the *Perini* decision nor Directive 99-1 addressed the constitutional ramifications of limiting the deduction from net worth to tangible property located in Massachusetts only. The Massachusetts Supreme Judicial Court, in the decision below, endorsed Directive 99-1 without considering the question of whether the Massachusetts corporate excise tax continues to discriminate in favor of domestic corporations by limiting the deduction from net worth to property located in Massachusetts only.

The Commerce Clause of the U.S. Constitution prohibits states from discriminating against interstate commerce by providing a direct commercial advantage to local business. By permitting a deduction from net worth for tangible property located in Massachusetts, but not for tangible property located outside the state, Massachusetts provides a direct commercial advantage to those businesses that invest in Massachusetts property and

thereby unconstitutionally discriminates against interstate commerce in violation of the Commerce Clause. Directive 99-1, which purportedly attempts to alleviate the constitutional infirmities in the corporate excise tax as identified by the *Perini* decision, fails to address this remaining infirmity. Accordingly, the Massachusetts Supreme Judicial Court's endorsement of Directive 99-1 in the opinion below is erroneous.

Additionally, the Directive fails to provide the clear and certain remedy required by the Due Process Clause. This absence of a clear and certain remedy is underscored by the fact that the Massachusetts Department of Revenue has failed, in practice, to apply the Directive as written.

This Court should grant the petition for a writ of certiorari, reverse the decision below, and prohibit Massachusetts from continuing to enforce a tax statute that remains unconstitutionally discriminatory.

ARGUMENT

I.

The Massachusetts corporate excise tax is a privilege tax imposed for the privilege of carrying on business in a corporate capacity. Mass. Gen. Laws ch. 63, §§32, 39. The tax is measured by both net income and property (either tangible property or net worth). *Id.* The questions presented in this case concern only the property measure of the Massachusetts corporate excise tax.

With respect to the property component of the Massachusetts corporate excise tax, Massachusetts law distinguishes between, and provides different tax calculations for, "tangible property corporations" and "intangible property corporations." For domestic intangible property corporations, "net worth" is defined as the book value of the corporation's total assets less: (1) its liabilities; (2) *the book value of its tangible property in Massachusetts subject to local taxation*; and (3) the book value of its investment in subsidiary corporations "organized in the commonwealth" which represent eighty percent or more of the voting stock of the corporation. Mass. Gen. Laws ch. 63, §30(8) (emphasis supplied) (hereinafter "Section 30(8)").[2] By contrast, the net worth of a foreign intangible property corporation is simply its total assets less its liabilities. Mass. Gen. Laws ch. 63, §30(9). Under Massachusetts law, at least prior to the Massachusetts Supreme Judicial Court's decision in *Perini* and the Department of Revenue's issuance of Directive 99-1, a domestic intangible property corporation could claim certain deductions from net worth – namely, investments in Massachusetts tangible property and 80% owned Massachusetts subsidiaries – that a foreign intangible property corporation could not.

II.

In *Perini*, supra, the Massachusetts Supreme Judicial Court held that the state's method for determining the

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[2] As will be discussed in more detail herein, the Massachusetts Supreme Judicial Court declared certain aspects of Section 30(8) unconstitutional in *Perini*, supra.

taxable net worth of an intangible property corporation unconstitutionally discriminated in favor of domestic corporations. In reaching this conclusion, the Massachusetts Supreme Judicial Court focused exclusively on the deduction available to domestic intangible corporations, set forth at Section 30(8), for the book value of investments in 80% or more owned Massachusetts subsidiaries. The Court noted that such a deduction would not be available for a domestic intangible property corporation if it owned 80% or more of a non-Massachusetts corporation. Accordingly, the Court ruled that such a statutory scheme unconstitutionally and impermissibly imposed a heavier burden on domestic corporations that owned foreign subsidiaries than on domestic corporations that owned domestic (i.e., Massachusetts) subsidiaries. *Perini*, 419 Mass. at 768, 647 N.E.2d at 56. According to the *Perini* court, such discrimination violated the Commerce Clause of the U.S. Constitution.

In a subsequent recommendation concerning final judgment, a justice of the Massachusetts Supreme Judicial Court found that it was necessary to strike the words "organized in the commonwealth" from the third clause of Section 30(8) in order to cure the discrimination inherent in the statute. *Perini Corp., et al. v. Massachusetts Commissioner of Revenue*, C.A. No. 93-393, SJC-6657, May 13, 1996 (supplementing the original opinion of March 22, 1995). Significantly, neither the original *Perini* decision nor the supplemental judgment order addressed the constitutional ramifications of the deduction contained in Section 30(8) for tangible property located in Massachusetts subject to local taxation (hereinafter "clause two

of Section 30(8)"). Additionally, the Massachusetts legislature has not amended Section 30(8) since the *Perini* decision.

In response to the *Perini* decision, the Massachusetts Department of Revenue, on January 4, 1999, issued Directive 99-1. (App. 1). In Directive 99-1, the Department, in an attempt to address the constitutional infirmities in the corporate excise tax identified by the Massachusetts Supreme Judicial Court in *Perini*, announced that: 1) domestic and foreign corporations could choose either the formula for domestic or foreign corporations in determining whether they were classified as tangible or intangible property corporations for purposes of the property component of the excise tax; and 2) domestic and foreign intangible property corporations could choose either the formula for domestic or foreign corporations for determining net worth. The Directive specifically states that a corporation can deduct from its net worth the value of any 80% or more owned subsidiary regardless of where the subsidiary is organized or doing business. Like the *Perini* decision, however, the Directive fails to address the deduction available in clause two of Section 30(8) for the value of tangible property located in Massachusetts and subject to local taxation.

III.

Petitioners in the present matter challenged certain aspects of the corporate excise tax on constitutional grounds. *Textron*, supra. In the opinion below, the Massachusetts Supreme Judicial Court upheld the statute against the Petitioners' challenge. In so holding, the

Massachusetts Supreme Judicial Court found that Directive 99-1, by allowing any intangible property corporation (foreign or domestic) to deduct its investment in any corporation wherever domiciled in calculating its net worth, cured the constitutional defects in the statute as identified by the Massachusetts Supreme Judicial Court in *Perini*. According to the opinion below, the Directive rendered the constitutional infirmities in Section 30(8), for all practical purposes, "moot." *Textron*, 435 Mass. at 306, 756 N.E.2d at 1149.

IV.

The Massachusetts Supreme Judicial Court's declaration in the opinion below that Directive 99-1 renders the constitutional infirmities of Section 30(8) "moot" is erroneous because the Directive fails to address the discrimination inherent in clause two of Section 30(8). As noted, clause two provides a deduction from net worth for the value of tangible property located in Massachusetts subject to local taxation. By its very terms, the deduction is not available for investments in tangible property located outside Massachusetts. For the following reasons, such a provision violates the Commerce Clause of the U.S. Constitution.

It is a cardinal rule of Commerce Clause jurisprudence that no state may impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977) (striking down a tax imposed only on out-of-state exchanges); *Bacchus Imports, Ltd., et al. v. Dias*, 468 U.S. 263 (1984)

(invalidating an exemption for liquor produced in Hawaii only); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S.Ct. 1590 (1997) (property tax exemption limited to property of organizations serving primarily in-state residents violates Commerce Clause). Indeed, state laws discriminating against interstate commerce on their face are virtually per se invalid. *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996).

In *Fulton*, a North Carolina intangibles tax that was imposed on stock to the extent that its issuing corporation participated in interstate commerce was found to violate the Commerce Clause. This Court held that "a regime that taxes stock only to the degree that its issuing corporation participates in interstate commerce favors domestic corporations over their foreign competitors in raising capital among North Carolina residents and tends, at least, to discourage domestic corporations from plying their trades in interstate commerce." *Fulton*, 516 U.S. at 333. In its most basic terms, *Fulton* stands for the proposition that a state tax that encourages in-state investment as opposed to out-of-state investment violates the Commerce Clause.

Clause two of Section 30(8) promotes the same type of impermissible discrimination struck down in *Fulton*. Under Section 30(8), an intangible property corporation, in determining its net worth, is permitted to deduct only personal property that is actually located in Massachusetts and subject to local taxation. Tangible property located outside Massachusetts is not eligible for the deduction. Thus, a taxpayer that invests in Massachusetts property derives a tax benefit that is unavailable to a taxpayer who invests in non-Massachusetts property.

This naturally encourages Massachusetts taxpayers to invest in Massachusetts, as opposed to out-of-state, property. Such a rule results in the type of "direct commercial advantage to local business" (*see Boston Stock Exchange, Bacchus,* supra) that is strictly forbidden by the Commerce Clause.

Directive 99-1, as well as *Perini,* fail to address the discrimination inherent in clause two of Section 30(8). Thus, Directive 99-1 is not the antidote envisioned by the Massachusetts Supreme Judicial Court in the opinion below to cure all constitutional infirmities contained in Section 30(8). By failing to address the in-state property deduction contained in clause two of Section 30(8), the Directive, contrary to the opinion below, falls short of rendering the discriminatory nature of Section 30(8) "moot." Directive 99-1 is nothing more than a convenient guise that allows Massachusetts to rationalize that the constitutional problems of Section 30(8) have been addressed. To the contrary, the problems remain. This Court should grant the petition for a writ of certiorari in order to prevent Massachusetts from enforcing a statute that remains constitutionally defective.

V.

By failing to address the remaining constitutional infirmities in Section 30(8), Directive 99-1 also violates the Due Process Clause of the U.S. Constitution. The Due Process Clause forbids any state to "deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. XIV, §1. In addressing the remedy

that should apply when a state's taxing statute is declared unconstitutional, this Court has consistently held that any such remedy must be "clear and certain." *Reich v. Collins*, 513 U.S. 106 (1994); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990).

For the following reasons, it is evident that Directive 99-1 does not provide the "clear and certain remedy" required by this Court's prior decisions. First, to the extent that Directive 99-1 fails to alleviate the discrimination resulting from limiting an intangible property corporation's deduction from net worth to Massachusetts property only, the Directive is not a "certain" remedy. Second, the Massachusetts Department of Revenue, in practice, has failed to apply the Directive as written. Pursuant to Notices of Intention to Assess Corporate Excise Tax dated July 26, 2001, the Department of Revenue informed General Motors that it would not be permitted to deduct from net worth its investment in 80% or more owned subsidiaries. The Department of Revenue's application of the Directive on audit is contrary to the express language of the Directive. Thus, the Department of Revenue's failure to apply the Directive as written renders the Directive an unclear and uncertain remedy and, accordingly, violates the Due Process Clause.

CONCLUSION

Despite the Massachusetts Supreme Judicial Court's decision in *Perini* and despite the Department's attempted administrative cure in Directive 99-1, Section

30(8) continues to discriminate in favor of Massachusetts corporations in violation of the Commerce Clause of the U.S. Constitution. The opinion below fails to recognize that Section 30(8) remains discriminatory even after *Perini* and issuance of Directive 99-1. Contrary to the opinion below, Directive 99-1 falls short of curing all discriminatory aspects of Section 30(8). The Directive, likewise, fails to provide the clear and certain remedy mandated by the Due Process Clause. Accordingly, it is imperative that this Court grant review to prevent Massachusetts from enforcing a statute that remains unconstitutional.

Respectfully submitted,

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February 25, 2002

[LOGO] COMMONWEALTH OF MASSACHUSETTS
Department of Revenue

Directive 99-1

Corporate Excise
Determining whether a corporation is a tangible property corporation or an intangible property corporation under G.L. c. 63 §§ 30.10, 30.11; calculating net worth of intangible property corporations under G.L. c. 63 §§ 30.8 and 30.9.

Introduction

In two instances the corporate excise statute requires foreign corporations and domestic corporations to employ different formulas in determining their tax liability. Specifically, those are: (i) the determination of a corporation's status as a tangible or intangible property corporation, and (ii) the calculation of net worth for intangible property corporations. Some elements of these formulas were invalidated on federal constitutional grounds. *Perini Corp. v. Commissioner of Revenue*, 419 Mass. 763 (1995), *cert. denied*, 516 U.S. 822 (1995). In accordance with the decision in *Perini*, this Directive clarifies the method for determining whether a corporation is a tangible or intangible property corporation, and for calculating an intangible property corporation's net worth.

Issues

1. How should domestic and foreign corporations determine whether they are tangible or intangible property corporations under G.L. c. 63 §§ 30.10, 30.11?

2. How should domestic and foreign intangible property corporations calculate their corporate net worth under G.L. c. 63 §§ 30.8 and 30.9?

Directive #1:

Domestic and foreign corporations are permitted to choose either of the two "Tangible or Intangible Property Corporation Classification" formulas from Schedule B of Forms 355A and 355B, for current and future taxable years, starting with the first tax year beginning after the date of this Directive. Thus, in making the determination of whether the corporation is a tangible or intangible property corporation, a domestic corporation can choose either (i) the formula for domestic corporations or (ii) the formula for foreign corporations, as the formulas are set out in G.L. c. 63 §§ 30.10, 30.11. Likewise, a foreign corporation can choose either (i) the formula for domestic corporations or (ii) the formula for foreign corporations, as set out in G.L. c. 63 §§ 30.10, 30.11. Corporations are permitted to make this choice annually.

Directive #2:

Regardless of the formula they choose to determine their status as an intangible property corporation, domestic and foreign intangible property corporations are permitted to choose either of the two net worth formulas, from Schedule D of Forms 355A and 355B, for calculating tax liability for current and future taxable years, starting with the first tax year beginning after the date of this Directive. A domestic corporation can choose either (i) the formula for domestic corporations set out in G.L. c. 63 § 30.8 or (ii) the formula for foreign corporations set out

in G.L. c. 63 § 30.9. A foreign corporation can choose either (i) the formula for domestic corporations set out in G.L. c. 63 § 30.8 or (ii) the formula for foreign corporations set out in G.L. c. 63 § 30.9. In applying these formulas, a corporation may deduct from its net worth the value of any subsidiary as to which the 80% voting stock interest requirement of the statute is satisfied, regardless of where the subsidiary is organized or is doing business. Corporations are permitted to make this choice annually.

Directive #3:

Corporations that would have benefited from the choice of formulas in this directive in prior tax years may be entitled to an abatement. Subject to the statute of limitations imposed by G.L. c. 62C § 37, corporations may apply for an abatement of taxes by using Form CA-6, according to instructions found at 830 CMR 62C.37.1 and TIR 93-11.

Discussion of Law:

The corporate excise statute provides separate methods for determining the status of domestic and foreign corporations as tangible or intangible property corporations. G.L. c. 63 §§ 30.7, 30.8. Under the statute, tangible and intangible property corporations are taxed differently under the non-income measure of the corporate excise. *See* G.L. c. 63 §§ 32(a)(1)(i), (ii), 39(a)(1)(i), (ii). The formulas for determining tangible/intangible status are set forth in the forms and instructions for Schedule B of form 355A (Domestic Business or Manufacturing Corporation

Excise Return) and Form 355B (Foreign Business or Manufacturing Corporation Excise Return).

Intangible property corporations are subject to a .26% tax on their net worth. G.L. c. 63 § 32(a)(ii), G.L. c. 63 § 39(a)(ii). The corporate excise statute provides separate formulas for calculating the net worth of domestic and foreign corporations. G.L. c. 63 § 30(8), (9). Those formulas are set forth in the forms and instructions for Schedule D of Form 355A and Form 355B.

The Supreme Judicial Court, in *Perini Corp. v. Commissioner of Revenue*, 419 Mass. 763 (1995), *cert. denied*, 516 U.S. 822 (1995), struck down as unconstitutional some parts of the corporate net worth formulas of G.L. c. 63 § 30.8 and 30.9. Specifically, the court invalidated the portion of G.L. c. 63 § 30.8 that prevented a domestic corporation from deducting from its net worth the value of a subsidiary not incorporated in Massachusetts if the domestic corporation owned 80% or more of the voting stock of the subsidiary. The court also invalidated the portion of G.L. c. 63 § 30.9 that prevented a foreign corporation from deducting from its net worth the value of a subsidiary incorporated or doing business in Massachusetts if the foreign corporation owned 80% or more of the voting stock of the subsidiary. The forms and instructions for the corporate excise return forms were revised to conform to the holding in *Perini*.

This Directive further clarifies the corporate excise statute in light of pending constitutional challenges to the divergent statutory treatment of domestic and foreign corporations. Without acknowledging the legal merit of these challenges, the Commissioner will permit corporations to determine whether they are tangible or intangible

property corporations using the statutory method for either domestic or foreign corporations, regardless of whether the corporation is domestic or foreign. Similarly, the Commissioner will permit such corporations to calculate their corporate excise using the statutory net worth formula for either domestic or foreign corporations.

Effective for its first taxable year beginning on or after January 1, 1999, a corporation may elect to use either the statutory formula for domestic or foreign corporations to determine whether the corporation is a tangible or intangible property corporation. The election is made by using Schedule B from either Form 355A or Form 355B on the return for that year. Likewise, effective for its first taxable year beginning on or after the date of this Directive, an intangible property corporation may elect to use either the statutory formula for domestic or foreign corporations for calculating its net worth. The Election is made by using Schedule D from either Form 355A or 355B on the return for that year.

Corporations that would have benefited in prior years from the choice of methods for determining their status as tangible or intangible property corporations, or from the choice of net worth formulas, may be entitled to an abatement. These abatements are subject to the statute of limitations set forth at G.L. c. 62c § 37. Corporations may apply for an abatement of taxes using form CA-6, according to instructions found at 830 CMR 62C.37.1 and TIR 93-11.

/s/ Bernard F. Crowley, Jr.
Bernard F. Crowley, Jr.
Acting Commissioner of Revenue
January 4, 1999